APPEAL NO. 170586
FILED MAY 8, 2017

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). Contested case hearings were held on November 15, 2016, and December 13, 2016, with the record closing on February 3, 2017, in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the respondent, (self-insured), was not the appellant's (claimant) employer for purposes of the 1989 Act; (2) the claimant was not in the course and scope of his employment when involved in a motor vehicle accident on (date of injury); (3) the self-insured is not relieved from liability under Section 409.004 because of the claimant's failure to timely notify his employer pursuant to Section 409.001; (4) since the claimant did not sustain a compensable injury, he has no disability; (5) the average weekly wage (AWW) is $760.20; and (6) the claimant did not sustain a compensable injury on (date of injury).

The claimant appealed the hearing officer's determinations that the self-insured was not the claimant's employer for purposes of the 1989 Act; that the claimant was not in the course and scope of employment when involved in a motor vehicle accident on (date of injury); that the claimant had no disability; and that the claimant did not sustain a compensable injury as contrary to the preponderance of the evidence.

The self-insured responded, urging affirmance.

The hearing officer's determinations that the self-insured is not relieved from liability under Section 409.004 because of the claimant's failure to timely notify his employer pursuant to Section 409.001 and that the AWW is $760.20 were not appealed and have become final pursuant to Section 410.169.

DECISION

Reversed and rendered in part and reversed and remanded in part.

The claimant testified that he had worked for a number of years detasseling seed corn for the self-insured in cornfields located in Weslaco, Texas and Plymouth, Indiana. He further testified that the work of detasseling was performed during periods lasting approximately three weeks during the spring and fall in Texas and during the summer in Indiana and that in between the three detasseling seasons when he worked for the self-insured, he was free to work for other employers.

As he had in previous years, the claimant attended a recruitment meeting in Texas with representatives from the self-insured who traveled to Texas for the purpose of recruiting workers willing to travel to Indiana to assist local work crews in detasseling seed corn. During the recruitment meeting, which occurred on May 31, 2014, the claimant signed a Worker Disclosure & Information Statement (disclosure). The claimant testified that he was to be paid for his attendance at the recruitment meeting and that he understood he was hired when he signed the disclosure. The disclosure states it is only a disclosure of the terms of potential employment with the self-insured, including the rate of pay, provisions for a housing stipend and an additional $120.00 stipend to be paid to the claimant upon his arrival in Indiana. The disclosure further provides that the claimant is responsible for obtaining his own transportation to and from the state of Texas and that work in Indiana is expected to run from approximately July 10, 2014, to July 24, 2014.

The claimant testified that, also as in years previous, he planned to travel to Indiana together with seven co-workers in a van owned and operated by (Mr. C); that the luggage of the workers traveling with Mr. C was transported in a separate vehicle operated by the self-insured's crew leader (Mr. R); that Mr. R and Mr. C coordinated the travel using their cell phones; that the crew spent the night mid-trip in Hope, Arkansas; that the claimant planned to pay Mr. C the sum of $100.00 for transportation to and from the state of Texas; and that Mr. R paid Mr. C the additional sum of $300.00 to cover costs of the trip to Indiana. The claimant testified that upon arrival in Indiana, prior to beginning work in the fields, he would receive "arrival pay" and a housing stipend and would attend a brief safety meeting. Employee payroll deductions, including state and federal taxes, were withheld from the arrival pay and housing stipend paid to the claimant. Work in the fields would begin within a week or sooner following arrival of the workers in Indiana.

(Ms. H), Administrative Coordinator for the self-insured at the Plymouth, Indiana plant testified that all pre-employment paperwork for workers recruited in Texas, including state tax forms, federal tax forms, the payroll choice form, the worker disclosure form and the USCIS I-9 Employment Eligibility Verification form is completed in Texas and turned in to the self-insured prior to the workers departing for Indiana. Ms. H further testified that the self-insured uses E-Verify to determine eligibility of its employees; that company policy requires that e-verification be obtained no later than the first day of employment but not before the job offer is accepted by the employee; and that e-verification was completed in Texas prior to the claimant and his co-workers leaving for Indiana.

It is undisputed that the claimant was injured in a motor vehicle accident on (date of injury), after beginning travel from Texas to Indiana when Mr. C's vehicle sustained a blowout and was involved in a rollover accident near Georgetown, Texas.

It is the claimant's position that he was the employee of the self-insured in the course and scope of his employment at the time of the accident.

The self-Insured argues that the claimant and his co-workers would not become employees of the self-insured until they arrived in Indiana, collected their arrival pay and housing stipend and attended a brief safety meeting.

EXISTENCE OF EMPLOYMENT RELATIONSHIP

Section 401.012(a) defines employee as a person in the service of another under a contract of hire, whether express or implied, or oral or written. As we stated in Appeals Panel Decision (APD) 93443, decided July 19, 1993, Professor Larson has noted that "the compensation concept of 'employee' is narrower than that of the common law concept of 'servant' in the respect that most statutes insist upon the existence of an express or implied contract of hire as an essential feature of the employment relation. 1C Larson, Workmen's Compensation Law, §§ 47.00, 47.10." We have also noted that whether a contract for hire exists is a mixed question of law and fact. APD 93931, decided November 23, 1993. In that case, we affirmed the finding of the hearing officer that a contract for hire had not been proven even though the claimant put on protective clothing at the plant site and was instructed in the use of the equipment. Fatal to the claim of a contract for hire was the lack of evidence of any payment or promise to pay the claimant for this time.

Under the facts of this case, where the claimant attended a recruitment meeting on May 31, 2014, for which he was to be paid; that he completed all pre-employment paper work on May 31, 2014, and had his employment eligibility verified electronically, which the self-insured's policy dictates must be completed after a job offer is accepted by the employee but no later than the first day of employment, and given that, as in years past, upon arrival in Indiana and prior to beginning work in the fields, the claimant was to be paid "arrival pay" and a housing stipend from which payroll deductions would be withheld, we hold that the hearing officer's decision that the self-insured was not the claimant's employer for purposes of the 1989 Act is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We accordingly reverse the hearing officer's determination that the self-insured was not the claimant's employer for purposes of the 1989 Act and render a new decision that the self-insured was the claimant's employer for purposes of the 1989 Act.

COURSE AND SCOPE OF EMPLOYMENT

Section 401.011(12) provides in pertinent part that "course and scope of employment" means an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer. Course and scope of employment as defined in Section 401.011(12) generally does not include transportation to and from the place of employment except in certain limited circumstances. The "special mission" exception provided by Section 401.011(12)(A)(iii) arises where the employee is directed in his employment to proceed from one place to another.

The key to this case is whether the claimant was an employee of the self-insured at the time of the injury. In his discussion, the hearing officer stated "[s]ince it was determined that [the] [c]laimant was not an employee of [the] [self-insured] for purposes of the [1989 Act], it was further determined that he was not in the course and scope of his employment when involved in a motor vehicle accident. . . . As noted above, we have reversed the hearing officer's determination that the self-insured was not the claimant's employer for purposes of the 1989 Act and rendered a new decision that the self-insured was the claimant's employer for purposes of the 1989 Act. The claimant's travel on (date of injury), from Texas was at the direction of and in furtherance of the business affairs of the self-insured and would not have been made had there been no business of the self-insured to be furthered by the travel. Accordingly, we reverse the hearing officer's determination that the claimant was not in the course and scope of his employment when involved in a motor vehicle accident on (date of injury), and render a new decision that the claimant was in the course and scope of his employment when involved in a motor vehicle accident on (date of injury). Because the claimant was in the course and scope of his employment when involved in the motor vehicle accident on (date of injury), we reverse the hearing officer's determination that the claimant did not sustain a compensable injury on (date of injury), and render a new decision that the claimant did sustain a compensable injury on (date of injury).

DISABILITY

Given that we have reversed the hearing officer's determination that the claimant did not sustain a compensable injury on (date of injury), and rendered a new decision that the claimant did sustain a compensable injury on (date of injury), we reverse the hearing officer's determination that the claimant did not have disability and we remand the issue of disability to the hearing officer to make a determination consistent with this decision.

SUMMARY

We reverse the hearing officer's determination that the self-insured was not the claimant's employer for purposes of the 1989 Act and render a new decision that the self-insured was the claimant's employer for purposes of the 1989 Act.

We reverse the hearing officer's determination that the claimant was not in the course and scope of his employment when involved in a motor vehicle accident on (date of injury), and render a new decision that the claimant was in the course and scope of his employment when involved in a motor vehicle accident on (date of injury).

We reverse the hearing officer's determination that the claimant did not sustain a compensable injury on (date of injury), and render a new decision that the claimant did sustain a compensable injury on (date of injury).

We reverse the hearing officer's determination that the claimant did not have disability and we remand the issue of disability to the hearing officer to make a determination consistent with this decision.

REMAND INSTRUCTIONS

On remand the hearing officer is to make findings of fact, conclusions of law and a determination regarding the issue of disability which are supported by the evidence and consistent with this decision. The hearing officer is not to consider additional evidence on remand.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Department of Insurance, Division of Workers' Compensation, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **E.I. DUPONT DE NEMOURS & COMPANY, INC. (a certified self-insured)** and the name and address of its registered agent for service of process is

RUSSELL STALLINGS
c/o CRAWFORD & COMPANY
769 KINGFISHER LANE
LEANDER, TEXAS 78641.

K. Eugene Kraft
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge